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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO AVALOS, Defendant and Appellant.	G029162 (Super. Ct. No. 00CF2138) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William L. Evans, Judge. Affirmed in part, reversed in part and modified.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, David Delgado-Rucci and Arlene Aquintey Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

Alejandro Avalos was charged with mayhem and aggravated assault. It was further alleged he inflicted great bodily injury during the assault and had suffered a prior strike conviction. The jury acquitted Avalos of mayhem, but found him guilty of the lesser included offenses of misdemeanor assault and battery. They convicted him of aggravated assault and found the great bodily injury allegation true. After finding the strike allegation true as well, the court sentenced Avalos to nine years in prison and ordered him to pay restitution to the City of Santa Ana. On appeal, Avalos contends the trial court committed instructional and sentencing error. He also challenges Proposition 21 as being violative of the single-subject rule of the California Constitution. We agree the court's sentencing order must be modified with respect to restitution and reversed with respect to one of the misdemeanors. Otherwise, we affirm.[1]

* * *

Early one morning, Santa Ana police and paramedics were dispatched to a residence in response to a call about a man having "violent attacks or seizures." When they arrived on the scene, Avalos was running in the street in his underwear. Officer Charles Elms ran after him while the paramedics situated their van to cut him off. When Avalos reached the van, he started hitting and kicking the passenger door. Then he reached through the window and began punching paramedic James Melton, who was sitting in the passenger seat.

Melton opened up his door and exited the van, but that did not mollify Avalos. He told Melton he was going to "fuck him up" and proceeded to punch and kick him. Melton grabbed Avalos and wrestled him to the ground. Then Elms and several other officers joined the fray in an attempt to subdue him. Avalos continued to struggle, however. In fact, when Melton looked away for an instant, Avalos lunged up and bit off

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[1] Avalos' challenge to Proposition 21 was recently rejected by the Supreme Court in *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 546. We are not at liberty to reexamine the issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

his left ear lobe. After that, the paramedics injected Avalos with a sedative and he began to settle down. He even stopped breathing at one point, but Melton—sans earlobe—kept him alive with an air bag.

Avalos was eventually taken to the hospital. His treating physicians believed his violent behavior and symptoms were more consistent with drug use than a seizure. Indeed, one doctor believed he presented "a classic case of psychosis induced by methamphetamines." Blood and urine testing confirmed Avalos had methamphetamine and amphetamine in his system when he arrived at the hospital. There was no evidence of him having suffered a seizure.

Avalos' sister testified she called 911 on the morning in question because it appeared to her that Avalos was having a seizure. She believed the seizure was still going on when Avalos was fighting with the police officers because his eyes looked funny and his mouth was foaming. Avalos' mother also believed Avalos was having a seizure when he was being taken into custody. She said he has suffered seizures since he was a young boy.

I

At trial, Avalos' defense was that he did not willfully engage in wrongful conduct because he was unconscious throughout the entire episode. He did not argue or seek instructions on self-defense. Nonetheless, he now claims the trial court had a sua sponte duty to instruct on that defense. We disagree.

The trial court in a criminal case must instruct """on the general principles of law relevant to the issues raised by the evidence. . . ."" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) But "[i]n the case of *defenses*, . . . a sua sponte instructional duty arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and the defense is not inconsistent with the defendant's theory of the case*.' [Citation.]" (*Id*. at p. 157, second italics added.)

As mentioned, Avalos' theory of the case was that he was unconscious and thus wholly unaware of his actions. He did not rely on self-defense. Moreover, self-defense requires that the defendant subjectively believe in the need for action. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Such a belief is entirely inconsistent with a claim of unconsciousness. (See *People v. Ray* (1975) 14 Cal.3d 20, 27, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 88-90.)

Nonetheless, relying on *People v. Elize* (1999) 71 Cal.App.4th 605, Avalos maintains the trial court should have instructed on self-defense as "an alternate theory" to unconsciousness. In *Elize*, the court held the trial court erred in failing to instruct on self-defense, even though the defendant's theory of the case was that he fired the gun by accident. Pivotal to the court's decision was the fact defense counsel actually requested instructions on self-defense. (See *id*. at p. 610.) In fact, the court made it clear "the issue of sua sponte duty or not has no place in this case." (*Id*. at p. 616.) Because that *is* the issue here, *Elize* is not controlling.

II

Avalos also contends the court prejudicially failed to give two cautionary instructions that are routinely given in criminal cases, CALJIC Nos. 2.22 and 2.27. The Attorney General agrees the instructions should have been given but asserts their omission was harmless. We agree with the Attorney General.

CALJIC No. 2.22 provides, "You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence."

Avalos maintains this instruction would have been helpful to the jury in deciding certain factual issues surrounding his arrest, such as whether he was exhibiting seizure symptoms at that time. However, in terms of the number of witnesses on these issues, the evidence was evenly divided. Officer Elms and paramedic Melton gave one version of events, saying Avalos did not exhibit any seizure symptoms. In contrast, Avalos' sister and mother testified Avalos did exhibit such symptoms. Because there were an equal number of percipient witnesses on both sides, and because the jury was given other instructions on how to evaluate witness credibility (e.g., CALJIC Nos. 2.13, 2.20 & 2.21.1), the failure to give CALJIC No. 2.22 was not prejudicial. (See *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097.)

As for CALJIC No. 2.27, that instruction states, "You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." Avalos asserts the instruction was crucial because his sister's testimony was uncorroborated. However, he admits that his mother backed up certain components of her testimony. In fact, Avalos' mother corroborated the most important aspect of his sister's testimony, i.e., that Avalos appeared be having a seizure when he was being taken into custody.

In any event, the failure to give a cautionary instruction such as CALJIC No. 2.27 "'does not constitute prejudicial error if "the evidence clearly points to the defendant's guilt, or . . . the testimony of the prosecuting witness[es] is amply corroborated, or there are other factors in the case which show that the defendant has been given a fair trial."'" (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 872.) Here, there was strong evidence Avalos was in fact guilty. Although his relatives went to bat for him at trial, the medical evidence undercut their testimony and corroborated the

testimony of prosecution witnesses Elms and Melton. Considering the evidence and instructions in their totality, it is not reasonably probable Avalos would have received a more favorable verdict had CALJIC No. 2.27 been given. Its omission was therefore harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

Avalos next contends the trial court erroneously believed it lacked discretion to strike his great bodily injury enhancement. The record belies this claim.

In calculating Avalos' sentence, the court imposed the midterm of three years on the aggravated assault count and then doubled that term to six years because of the prior strike conviction. On top of that, the court imposed a consecutive three-year term for the great bodily injury enhancement. When defense counsel balked at this, the court said it was "going to impose the [great bodily injury enhancement], and it's . . . consecutive — the court has no discretion except to put that consecutive."

Avalos construes the court's statement as proof it was ignorant of its authority to strike the great bodily injury enhancement. However, it does not appear the court was speaking to its authority to strike the enhancement when it mentioned its lack of discretion. Rather, it seems the court was explaining the manner in which the enhancement had to be imposed. (See generally Pen. Code, § 12022.7 [mandating that enhancement be imposed "in addition and consecutive" to underlying felony].) This interpretation is supported by the fact the court addressed separate issues in its statement. First, it said it was going to impose sentence on the enhancement. Then, it went on to say that the enhancement had to be imposed consecutively. These things convince us the trial court understood its sentencing discretion.

IV

Next, Avalos cites as error the court's order requiring him to pay $28,667.79 in restitution to the City of Santa Ana. He concedes the city paid that amount

for Melton's medical treatment. However, he claims the city was not a direct victim under the restitution statute. He is right.

The pertinent statute is Penal Code section 1202.4, which provides, "In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (Pen. Code, § 1202.4, subd. (f).) For purposes of this section, the term victim includes "[a]ny corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime." (Pen. Code, § 1202.4, subd. (k)(2).)

The seminal case on these provisions is *People v. Birkett* (1999) 21 Cal.4th 226. There, the California Supreme Court decided insurance companies which had reimbursed certain car theft victims were not entitled to restitution because they were not "direct victims" of the defendant's crimes. The Attorney General argues the present case is distinguishable from *Birkett* because, unlike the insurance carriers in that case, the City of Santa Ana did not reimburse Melton for his medical expenses. Rather, it paid those expenses directly to Melton's health care providers. However, that still does not make the city a direct victim. *Birkett* makes clear that the class of people entitled to restitution is "limited to those persons or entitities *against which* the [defendant's] crimes had been committed." (*Id*. at p. 232.) The class does not include "persons whose losses arose only as a result of crimes committed against others." (*Id*. at p. 243.) It is undisputed that the city's losses arose only as a result of crimes committed against Melton. Therefore, as Avalos maintains, the court's order must be modified to name Melton as the intended recipient of his restitution payments.[2]

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[2] We recognize Melton isn't out of pocket for his medical expenses. However, "There is no great novelty in the notion that a person injured or damaged by the wrongful conduct of another may obtain full recovery

V

Avalos' remaining argument is a bit convoluted. Initially, he maintains the court erred when it "failed to impose sentence" on the misdemeanor offenses of assault and battery, which were charged as lesser included offenses of mayhem in count one. Then he turns around and argues the court erred when it "failed to dismiss" his conviction for misdemeanor assault because that crime is a necessarily included offense of aggravated assault, of which he was convicted in count two. Avalos further claims that, at the very least, the court should have stayed both misdemeanors under Penal Code section 654 because they were part and parcel of the aggravated assault.

In response, the Attorney General points out the court did stay sentence on the misdemeanors, even though that decision is not reflected in the abstract. The Attorney General does not address Avalos' claim that his conviction for misdemeanor assault must be dismissed altogether. Perhaps that is due to the confusing layout of Avalos' arguments. Nonetheless, the claim has merit.

It has long been the rule that "'multiple convictions may not be based on necessarily included offenses.'" (*People v. Ortega* (1998) 19 Cal.4th 686, 692, italics omitted.) In this case, Avalos was convicted of aggravated assault and the necessarily included offense of simple assault. Although the simple assault was offered as a lesser included offense to the mayhem charge, the prosecutor argued that it was based on the very same conduct underlying the aggravated assault count, i.e., the ear biting. Under these circumstances, Avalos' conviction for simple assault must be reversed.

DISPOSITION

The court's sentencing order is modified to substitute James Melton in lieu of the City of Santa Ana as the victim to whom Avalos must make restitution. In

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from the wrongdoer even after partial or full reimbursement from an independent source." (*People v. Birkett, supra*, 21 Cal.4th at p. 247, fn. 19.) Of course, the city is free to pursue whatever civil remedies may be at its disposal to obtain indemnification from Melton. (*Id*. at p. 246.)

addition, Avalos' conviction for misdemeanor assault under count one is reversed. Avalos' battery conviction under count one, which the court stayed, is not affected by this ruling and should be reflected in the abstract of judgment. In all other respects, the judgment is affirmed. The clerk of the trial court is directed to prepare and forward to the Department of Corrections a modified abstract of judgment reflecting these modifications.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.